

226973

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com

THOMAS F. MCFARLAND

May 6, 2010

By e-filing

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
.395 E Street, S.W.
Washington, DC 20024

ENTERED
Office of Proceedings

MAY - 6 2010

Part of
Public Record

Re: STB Docket No. AB-1063, *Backtrack, Inc.* -- *Adverse Abandonment* -- in *Cerro Gordo County, IA*

Dear Ms. Brown:

Hereby transmitted is a Motion For Rejection Of Petition For Waivers And Exemption and Reply In Partial Opposition If Petition Is Not Rejected for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Backtrack, Inc.

TMcf:kl:enc:wp8.0\437\ef\STB2

BEFORE THE
SURFACE TRANSPORTATION BOARD

BACKTRACK, INC. -- ADVERSE)
ABANDONMENT -- IN CERRO GORDO)
COUNTY, IA)

**MOTION FOR REJECTION OF PETITION
FOR WAIVERS AND EXEMPTION
OR
REPLY IN PARTIAL OPPOSITION
IF PETITION IS NOT REJECTED**

BACKTRACK, INC.
P.O. Box 278
Bettendorf, IA 52722

Respondent

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)
mcfarland@aol.com

Attorney for Respondent

Due Date: May 17, 2010
Date Filed: May 6, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|-------------------------------|---|-------------|
| BACKTRACK, INC. -- ADVERSE |) | STB DOCKET |
| ABANDONMENT -- IN CERRO GORDO |) | NO. AB-1063 |
| COUNTY, IA |) | |

**MOTION FOR REJECTION OF PETITION
FOR WAIVERS AND EXEMPTION
OR
REPLY IN PARTIAL OPPOSITION
IF PETITION IS NOT REJECTED**

Pursuant to 49 C.F.R. § 1104.13(a) and 49 C.F.R. § 1117.1, BACKTRACK, INC. (Backtrack) hereby moves for rejection of a Petition for Waivers and Exemption (Petition) filed by Cerro Gordo County, Iowa (the County) on April 26, 2010, and replies in partial opposition to that Petition if it is not rejected.^{1/}

MOTION FOR REJECTION

The Petition should be rejected because the County has not named as a Respondent, nor served its Petition on, a necessary party to adverse abandonment of the rail line under consideration, i.e., Iowa Traction Railroad Company (IATR). Neither the application for adverse abandonment, nor the related Petition as an essential preliminary filing, should be permitted to go forward until the County identifies IATR as a Respondent, and serves the Petition on IATR.

In a Notice of Exemption in ICC Finance Docket No. 31353, *Iowa Traction R. Co. -- Oper. Exempt. -- Hermitage Homes, Inc.*, served Nov. 23, 1988, copy attached as Appendix 1,

^{1/} In a decision served on April 29, 2010, the Board denied the County's request for accelerated disposition of the Petition.

IATR was authorized to operate, pursuant to lease from Hermitage Homes, three miles of rail line in Mason City, Iowa between Milepost Nos. 152.5 and 155.5. Backtrack is a successor of Hermitage Homes. The 300 feet of rail line sought to be adversely abandoned in this proceeding is part of the three miles of rail line involved in that proceeding.^{2/}

It follows that if the County's application for adverse abandonment were to be granted, IATR's authority to operate over 300 feet of rail line at and near Road B-20 would be involuntarily discontinued, and the portion of the 3-mile rail line south of that 300-foot segment would be involuntarily severed from the national rail system, thereby precluding IATR from operating over it. That being the case, IATR clearly has a legitimate interest in this proceeding because it would be adversely affected if the relief sought by the County were to be granted.

In spite of that legitimate interest, IATR was not named as a Respondent, nor has it been served with a copy of the Petition. That denial of notice and opportunity for comment cannot be reconciled with procedural due process of law. Accordingly, the Petition should be rejected as fatally defective.

**THE BOARD CANNOT REQUIRE CONVEYANCE OF THE
RAIL SEGMENT TO THE COUNTY UNDER 49 U.S.C. § 10905**

As a preliminary matter, the Board should make clear that it does not have authority under 49 U.S.C. § 10905 to order Backtrack to convey the rail segment under consideration to the County. At pages 2 and 11-12 of the Petition, the County stated its intent to request the Board to order such a conveyance. While that statement does not relate to any County request for

^{2/} Contrary to allegations in the Petition, the three miles of rail line authorized to be operated by IATR is connected to the national rail system, i.e., the 3-mile line connects to rail line owned by Union Pacific Railroad Company (UP) that has never been abandoned.

waiver or exemption, the Board should clarify at the outset that there can be no such conveyance under that statute.

As here pertinent, it is provided in 49 U.S.C. § 10905 that if the Board finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold or otherwise disposed of only under conditions provided in the order of the Board, which may include a prohibition of any such disposal for a period of not more than 180 days after the effective date of the order unless the properties have first been offered, on reasonable terms, for sale for public purposes.

In *Connecticut Trust for Hist. Preserv. v. ICC*, 841 F.2d 479 (2d Cir. 1988), the Court upheld the ICC's interpretation that the ICC lacks power under that statute to require sale or to impose terms and conditions of sale of such rail properties (at 483). Therefore, even if the Board were to find in the present case that the 300-foot segment under consideration is appropriate for public purposes and is not required for continued rail operations, the Board would not be authorized under 49 U.S.C. § 10905 to order a conveyance of that segment to the County, as the County intends to request. Instead, upon consummation of abandonment of that segment, ownership of the land in the right-of-way of that segment would be determined under Iowa law, i.e., such ownership would be in Backtrack to the extent that Backtrack owns the fee interest in that land, or such ownership would be retained by a different fee owner, no longer subject to a rail easement, if Backtrack operated over the segment pursuant to a railroad easement, or would

pass to adjoining landowners on each side of the right-of-way land in the absence of evidence of who holds the fee interest.^{3/}

REPLY IN PARTIAL OPPOSITION

If the Petition is not rejected, Backtrack opposes several of the waiver or exemption requests for the reasons stated below.

1. Environmental and Historic Reporting and Information Requirements

Backtrack opposes the County's request for waiver of 49 C.F.R. § 1152.20(c), which requires environmental and historic reporting in accordance with 49 C.F.R. § 1105.7 and 1105.8, as well as the County's request for waiver of 49 C.F.R. § 1152.22(f), which requires information regarding the environmental impact of the proposed abandonment. (Petition at 7-9).

Except where a rail line would continue to be actively operated by a different rail carrier following authorization of discontinuance of rail service, which would not be the case in the matter under consideration, the Board consistently denies requests for waiver of regulations requiring environmental and historic reporting and information. *See, e.g., The City of Chicago, IL -- Adverse Aban. -- Chicago Terminal Railroad in Chicago, IL*, STB Docket No. AB-1036, decision served July 10, 2009, at 6 ("... (T)he Board generally conducts a full environmental and historic review in adverse abandonment cases, and environmental and historic reports give the agency the information necessary to conduct that review ..."). *Accord: Norfolk Southern Ry.*

^{3/} Many of the allegations of fact at pages 1-4 of the Petition are incorrect, such as the allegation that the segment of rail line a short distance north of Road B-20 has been formally abandoned (at 3). Backtrack would provide accurate facts in its Protest against the abandonment application.

Co. -- Adverse Aban. -- St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286), decision served Oct. 26, 2006, at 4.

The County argues that waiver would be appropriate because there would be no adverse environmental and historic effect from the proposed abandonment because the line segment under consideration has not been operated for over two decades and because there are no structures on the segment. (Petition at 8). However, as is apparent from the Board's decision in *Denver & Rio Grande Ry. H.F. -- Adverse Aban. -- in Mineral County, CO*, STB Docket No. AB-1014, decision served Oct. 18, 2007, where the rail line proposed to be abandoned had not been operated for 38 years, mere non-use of a rail line does not justify waiver of environmental and historic reporting requirements. As the Board there said in denying waiver of those requirements, "because abandonment of the Line could have environmental or historic impacts that are not readily apparent, the City's waiver request for this requirement will be denied." (*id.* at 4).

The County has not provided compelling justification for the Board to depart from the consistent precedent identified above. Accordingly, the requested waiver from environmental and historic reporting and informational requirements should be denied.

2. Newspaper Publication of Notice of Intent to Abandon

Backtrack opposes the County's request for waiver of 49 C.F.R. § 1152.20(a)(4), which requires newspaper publication of the Notice of Intent to Abandon in a newspaper of general circulation in the local area for three consecutive weeks. (Petition at 7).

The Board denies requests to waive the requirement of newspaper notice for the reasons explained in *Norfolk Southern Ry. Co. -- Adverse Aban. -- in St. Joseph County, IN, supra*, STB Docket No. AB-290 (Sub-No. 236), decision served Oct. 26, 2006, at 4, viz:

. . . Newspaper publication is not onerous and ensures that all persons and entities with an interest in the Lines are given notice and the opportunity to participate in any proceedings. Therefore, we will deny the waiver request.

The Board should deny the County's request for waiver of 49 C.F.R. § 1152.20(a)(4) for the same reasons.

3. Time For Filing Protests

Backtrack opposes the County's request for wavier of the 45-day time frame in 49 C.F.R. § 1152.25(c)(1) for filing Protests against the proposed abandonment application. (Petition at 15). The County argues for either a 20-day time frame (*id.* and Attachment A at 4), or a 30-day time frame (Attachment B at 3) for the filing of such Protests.

The County has not provided any justification that would warrant the sought reduction of the time frame for protests. Certainly, there is no warrant for a lesser time frame for protests in adverse abandonment cases than in conventional abandonment cases. By their very nature, adverse abandonment cases are almost always hotly contested, as the present case surely will be, whereas many conventional abandonment cases do not involve intense protests. That differentiation is, if anything, justification for a lengthier time frame for protests in adverse abandonments, not a shortened time frame. Accordingly, the requested waiver of 49 C.F.R. § 1152.25(c)(1) and proposed amended time frames for filing protests should be denied.

4. General Requirements of 49 U.S.C. § 10903

It is difficult to determine what relief, if any, the County is seeking in its discussion of 49 U.S.C. § 10903 at pages 6-7 of the Petition. As far as Backtrack can tell from that discussion, the County appears to be under the impression that the provisions of 49 U.S.C. § 10903 do not apply to the matter at hand because neither the County nor Backtrack is a rail carrier, so that no request for exemption from any provision of § 10903 is necessary.

It is clear, however, that 49 U.S.C. § 10903 applies to the matter at hand because IATR is a rail carrier, regardless of whether Backtrack has a residual common carrier obligation with respect to the line segment proposed for abandonment, which would make it a rail carrier as well. Indeed, the application of 49 U.S.C. § 10903 to the matter at hand is the very reason that the County is required to file an adverse abandonment application to terminate the federal interest in the line segment under consideration.

5. Labor Protective Conditions

Although the County's allegations about the absence of a requirement for labor protective conditions in the matter at hand do not relate to a request for waiver or exemption, such allegations are legally misplaced. Labor protective conditions are imposed in relation to all grants of abandonment authority except if the abandonment encompasses the entire rail line of the involved rail carrier. In the matter at hand, abandonment of the 300-foot segment does not involve IATR's entire rail line. Accordingly, labor protective conditions would be mandatory in any authorization of abandonment of the line segment.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should deny the County's requests for waiver of the environmental and historic reporting and informational requirements of 49 C.F.R. § 1152.20(c) and 49 C.F.R. § 1152.22(f); the newspaper publication requirements of 49 C.F.R. § 1152.20(a)(4); and the time frame for filing protests in 49 C.F.R. § 1152.25(c)(1). In addition, the Board should clarify that it does not have authority under 49 U.S.C. § 10905 to order Backtrack to convey the involved line segment to the County; that 49 U.S.C. § 10903 applies to the proposed abandonment because IATR is authorized to operate over the involved line segment as a rail carrier; and that labor protective conditions would be mandatory if the proposed abandonment were to be authorized.

Respectfully submitted,

BACKTRACK, INC.
P.O. Box 278
Bettendorf, IA 52722

Respondent

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 (fax)
mcfarland@aol.com

Attorney for Respondent

Due Date: May 17, 2010
Date Filed: May 6, 2010

APPENDIX 1

FR-7035-01
DO

FD/2
SERVICE DATE
NOV 23 1988

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

Finance Docket No. 31353

IOWA TRACTION RAILROAD COMPANY--
OPERATION EXEMPTION--HERMITAGE HOMES, INC.

Iowa Traction Railroad Company (Traction) has filed a notice of exemption to lease and operate certain railroad property owned by Hermitage Homes, Inc. (Hermitage). Traction will lease and operate a 3-mile portion of the rail line from milepost 152.5 to milepost 155.5 in Mason City, IA. The line was previously abandoned by Chicago and North Western Transportation Company in Docket No. AB-1 (Sub-No. 205X), and was purchased by Hermitage (a non-rail carrier). Hermitage leased the line segment to Traction on August 6, 1988. Traction's operation of the line segment is expected to be consummated on the effective date of the exemption.

Any comments must be filed with the Commission and served on Thomas F. McFarland, Jr., Belnap, Spencer, McFarland, Emrich & Herman, 20 North Wacker Drive, Suite 3710, Chicago, IL 60606.

Traction must preserve intact all sites and structures more than 50 years old until compliance with the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. 470, is achieved. See Class

Exemption--Acq. & Oper. of R. Lines under 49 U.S.C. 10901, 4
I.C.C.2d 305 (1988).

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: November 2, 1988

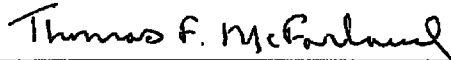
By the Commission, Jane F. Mackall, Director, Office of Proceedings.

(SEAL)

Noreta R. McGee
Secretary

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2010, I served the foregoing document, Motion For Rejection Of Petition For Waivers An Exemption Or Reply In Partial Opposition If Petition Is Not Rejected, on Randall E. Nielsen, Pappajohn, Shriver, Eide & Nielsen, P.C., 103 East State Street, Suite 800, P.O. Box 1588, Mason City, IA 50402, nielsen@pappajohnlaw.com, by e-mail and first-class, U.S. mail, postage prepaid.



Thomas F. McFarland